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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

TRISHA R.,

Petitioner,

v.

THE SUPERIOR COURT OF KERN
COUNTY,

Respondent,

KERN COUNTY DEPARTMENT OF
HUMAN SERVICES et al.,

Real Parties In Interest.

F046245

(Super. Ct. No. JD104261)

OPINION

THE COURT*

ORIGINAL PROCEEDINGS; petition for extraordinary writ review. Richard J. Oberholzer, Judge.

Teri A. Kanefield, for Petitioner.

No appearance for Respondent.

Bernard C. Barmann, Sr., County Counsel, and Jennifer Esquivel Zahry, Deputy County Counsel, for Real Party In Interest Kern County Department of Human Services.

No appearance for Real Party In Interest Emanuel R.

*Before Vartabedian, Acting P.J., Harris, J., and Cornell, J.

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Petitioner Trisha R. is the mother of a dependent child, Jordyn R. She challenges respondent's dispositional order denying her request as the child's non-custodial, non-offending parent for custody under Welfare and Institutions Code, section 361.2.¹ She contends the court's denial was erroneous because it failed to apply section 361.2 and there was no evidence that placement of Jordyn with her would be detrimental to his safety, protection, or physical or emotional well-being. Real party Kern County Department of Human Services (the department), which argued in favor of such a placement in the trial court, joins in petitioner's request for relief. On review, we agree and will grant relief.

PROCEDURAL AND FACTUAL HISTORY

Two-year-old Jordyn came to the department's attention in July 2004 when his father left him unattended in a motel room for approximately two hours with no access to food or water. The father's repeated involvement in domestic violence with a live-in girlfriend and use of marijuana also placed the child at risk of suffering physical harm or injury.

When the department inquired of the father about the whereabouts of Jordyn's mother, the father claimed she lived in San Bernardino where she abandoned Jordyn when he was only three-months-old; previously, according to the father, Jordyn suffered from a failure to thrive due to her neglect. The mother, upon learning of Jordyn's detention, told the department a very different story.

According to the mother, she and the father lived together in her parents' home when she learned of her pregnancy. Soon after, the father was "'kicked out'" due to his anger issues. He continually made threats toward her during her pregnancy. When

¹ All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Jordyn was approximately three-months-old, the mother had him hospitalized due to his loss of weight. After doctors recommended a formula change, Jordyn began to gain weight. Roughly one month later, the mother permitted the father an overnight visit at his parents' home with Jordyn but the father did not return the child as promised. The father went so far as to threaten her with harm if she went to his parents' home. He justified his actions by claiming she was ““hanging around”” with drug users.

The mother acknowledged to social workers that she had some friends who used drugs but that she never used illegal controlled substances. Ironically, when she previously had contact with the father, he was smoking marijuana. The mother sought the help of law enforcement, legal aid and the courts -- but without a custody order or the means of locating and serving the father -- she allegedly was told she had no recourse. Afraid of the father petitioner refrained from seeing Jordyn while he apparently lived with his father and grandparents. Eventually, however, the father disappeared with Jordyn.

Further investigation by the department revealed the father took Jordyn to Arizona where the father was arrested more than once and convicted on domestic violence charges involving his live-in girlfriend. Shortly after the father's last arrest in Arizona, the couple moved with Jordyn to Kern County purportedly to be close to the girlfriend's child who was a juvenile dependent.

At a dispositional hearing in Jordyn's case, the department recommended that the court remove the child from the father's custody, place the child with the mother, and dismiss the dependency proceedings. In making its placement recommendation, the department cited the mother's request for custody, her efforts to reestablish a relationship with Jordyn since his detention, her lack of any criminal record and its favorable evaluation of her home.

The father objected, relying on his prior claim that the mother had abandoned Jordyn nearly two years earlier and thus had no relationship with the child. The father

also claimed that Jordyn had been malnourished while in the mother's care and before her pregnancy with Jordyn, the mother used drugs. The department impeached the father through his criminal record.

The mother took the stand in support of her custody request. She described her current situation as follows: she had two other children, a kindergartener and one-year-old and lived with them in the San Bernardino home of her mother and step-father. She worked in a hospice while attending a medical assistant program; at the time of her testimony she had completed six months of the eight-month program. She received welfare benefits for her older son, whose father had died, as well as food stamps. The father of her youngest child had recently returned from active duty in Iraq and it was possible they would marry at some point. Once she learned of Jordyn's detention, she traveled once-a-week as authorized by the court to visit him. She also started to include her other children in her trips and the visits went well.

The mother denied ever using drugs. However, she admitted that before her pregnancy with Jordyn she had acquaintances and at least one friend who were involved in illegal drugs. She stopped her association with them after some physical confrontations.

She also testified regarding her claim that the father took Jordyn away from her and forbid her from seeing him. She reiterated her fear of the father and her inability to pursue custody through law enforcement and the courts.

Following argument on the matter, the court ordered Jordyn removed from his father's custody and ordered reunification services for each parent.

DISCUSSION

When a court orders removal of a child (§ 361) from parental custody, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of section 300, who desires to assume custody of the child. (§ 361.2, subd.

(a.) If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child. (*Ibid.*) If the court places the child with that parent it may do essentially either of the following: (1) order that the parent become legal and physical custodian of the child and terminate its jurisdiction over the child; or (2) order that the parent assume custody subject to the supervision of the juvenile court, with services provided to one or both parents. (§ 361.2, subd. (b).) The law further requires the court to make a finding either in writing or on the record of the basis for its determination under subdivisions (a) and (b) of section 361.2. (§ 361.2, subd. (c).)

Nowhere in the record on appeal is there any reference to the requirements of section 361.2. It is also unclear whether the trial court even considered the statutory provision for placement of Jordyn with his mother absent a finding that such a placement would be detrimental to his safety, protection, or physical or emotional well-being. Thus, we are not inclined to imply a finding of detriment on this record. (*In re Marquis D.* (1995) 38 Cal.App.4th 1318, 1324 1325.)

In any event, our review of the record reveals no evidence of current detriment, that is, no evidence that to place Jordyn with the mother would be detrimental. What does appear from the record is the court's disdain for petitioner based on her acceptance of the father's terms two years earlier when he took Jordyn away from her. However, that did not justify the court's decision now. Further, the court's apparent conclusion that the mother relied on her parents to raise her other children and on the government to support her was thoroughly unsupported by the record. We therefore conclude the juvenile court erred and the mother is entitled to relief.

DISPOSITION

The petition for extraordinary writ is granted. Let a writ of extraordinary relief issue directing the respondent court to vacate its prior denial of petitioner's request for

placement and issue a new order placing Jordyn R. in petitioner's care and custody subject to family maintenance services.